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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 894

JAMES H. FRIEND, SILAS TROWELL and FLOYD LONG,
Petitioners,

vs.

TROPIS COMPANY, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The District Court entered judgment on a jury verdict in favor of respondent. The opinion of the Court of Appeals for the Fourth Circuit (Appendix of Petition) is reported at 382 F. (2d) 633.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the unexpected accumulation of a static electrical charge upon the persons of petitioners brought

about by changing atmospheric conditions well beyond any control by respondent and not preventable by it made the vessel on which petitioners worked unseaworthy and respondent thus liable for any injury caused petitioners by the subsequent running off of that charge from their persons.

STATEMENT

Petitioners filed their action for damages against respondent, claiming injury from electrical shock allegedly received while discharging cargo from the hold of respondent's vessel. Both in the District Court and in the Court of Appeals they contended that the electric shock originated in bad wiring on the vessel which caused it to be unseaworthy.

Respondent denied this contention that bad wiring caused the shock. It sought to establish that a static charge had built up upon petitioners' persons and that this charge was discharged therefrom when they touched any metallic portion of the vessel which acted as a ground. This, respondent contended, came about from changing atmospheric conditions which it could not control or even anticipate, and could not be prevented from occurring.

The trial jury chose to reject petitioners' theory that bad wiring caused the shock to occur and accepted respondent's evidence that a static electrical discharge from petitioners' persons was the origin of their complaints.

Petitioners contend that even the presence of the unanticipated and unavoidable static charge upon their persons made the vessel unseaworthy and respondent liable. Both the District Court and the Circuit Court of Appeals disagreed.

On November 1, 1963, petitioners were helping remove a bulk cargo of potash from respondent's vessel. The potash (used in fertilizer) was an inert substance, loose, dry and free-running. It was shoveled toward the middle of the cargo space by petitioners. From 8:00 A.M. until 2:00 P.M. the work proceeded uneventfully. Shortly thereafter petitioners each related sliding through the potash, then stopping their slide by catching hold of a metal stanchion or beam. Each claimed a single electric shock upon touching the metal. Work was suspended as a precaution. No source of the charge could be found until it was demonstrated that a sparking could be created by running a shovel into the cargo, then placing it close to a metallic part of the vessel. The sparking could not be repeated until the shovel was run again through the cargo.

Contrary to petitioners' contention, it was not necessary for anyone to ground the ship's ladder when they left the hold and the evidence of this fact was accepted by the jury.

No further incident occurred when the potash discharge was resumed later.

To identify the source of petitioners' complaints, experts made an inspection on board. They not only ruled out bad wiring as the cause of the shocks, but agreed that static electricity which had built up upon the persons of petitioners and then was discharged on contact with the metallic structure of the vessel was responsible. This accumulation of a static charge, they concluded, came about from a change in the weather conditions existing in the geographical area where the vessel was located, and could not be prevented from occurring.

A brief summary of the uncontradicted factual (and expert) evidence is appropriate:

(1) No lights were burning and no electrical current was being used in the forward part of the vessel at the time petitioners relate being shocked.

(2) Each petitioner slid with the cargo, then caught a metallic stanchion or beam of the ship to stop his slide, and relates receiving a single shock as he touched the metal.

(3) The humidity reading of 57 per cent at 8:00 A.M. had dropped to a reading of 36 per cent at 2:00 P.M. This latter reading was described as an unusually low relative humidity.

(4) The cargo of potash was dry and free-running and dusty.

(5) The test previously referred to demonstrated that a shovel moved through the potash would release a charge to a metal stanchion which could not be repeated until the shovel was moved through the potash again.

(6) A static electrical charge is a natural phenomenon. It did not extend from the vessel to the petitioners. Rather it accumulated upon their persons and then was discharged to a ground (metallic part of the vessel) when touched by them. It is what one would experience in walking across a thick rug and then touching a switchplate or other ground. It is the popping one experiences upon sliding across the plastic seat cover of an automobile on a dry cool day and then touching the metal door handle. It occurs primarily in dry conditions. Walking across this potash cargo one could build up a static charge on his body, then receive a shock when he touched a

metal object allowing the charge to run off. Damp air (high humidity) allows such a charge to bleed off of a person because it is good conductor. Dry air (low humidity) is a good insulator and does not bleed off a charge building up on a person. A static electric discharge when it occurs is almost instantaneous, only a fraction of a second being required to allow the charge to leave one's body and go to ground.

(7) No practical way is known to so equip the hold of a ship with a bulk dry cargo that petitioners' experience could be avoided.

(8) In any event, according to petitioners, such an experience had never before been encountered in their 25 years on the waterfront in working cargoes such as this one.

(9) One petitioner visited a hospital emergency room and returned to the vessel. The others stayed on the job. All sought medical attention later and exhibited signs of apprehension and nervousness. All recovered.

ARGUMENT

The issue presented here is a very narrow one, presents no new question of law, and does not involve any conflict with the previous rulings of this Court or of the Circuit Courts of Appeals. Basically petitioners' real complaint is that since they were shocked, they should be compensated for the same. The trial jury disagreed as did the District Court and Court of Appeals. The factual dispute being resolved against them by the jury, the matter should rest there.

I.

THE DECISION BELOW IS CLEARLY CORRECT

Petitioners sought in the Trial Court to establish not only that they received a shock but also that such shock was brought about from stray charges in defective wiring on board the vessel. Respondent affirmatively sought to prove that the charge which brought on the shock was a static one upon their persons caused by weather conditions not controlled or preventable by anyone. The trial jury rejected petitioners' contentions about bad wiring and accepted the evidence that a static charge brought about their complaints.

The District Judge told the jury that petitioners had been shocked and that if bad wiring caused the same petitioners were to recover. But that if a static charge caused the shocks, theye were not entitled to recover.

The Circuit Court of Appeals affirmed, stating first that petitioners' only burden was to establish that they were shocked while working on the vessel. This, the Court said, was sufficient to establish a prima facie case of unseaworthiness upon which a verdict in petitioners' favor could be based. But the Court of Appeals also recognized respondent's right to refute this presumption of unseaworthiness with proof that the shocks were caused by a condition for which respondent was not liable. This it held respondent did by its proof explaining the source of the charge.

The Circuit Court of Appeals properly found that the vessel under the facts was seaworthy even though petitioners sustained a shock on board. It stated that

(Page 636) "The causative factor here was

the entry into the hold of relatively drier air with its insulating properties. The potential for harm arose not because electricity was generated but because the air would not bleed it off to ground. This was a natural condition of the natural atmosphere. The happening of the injurious discharge, when the men touched a willing conductor, was no more controllable by the ship than was a stroke of lightning, and just as unforeseeable."
382 F(2d) 633.

2.

THERE IS NO CONFLICT OF DECISIONS AND NO FAILURE TO FOLLOW ESTABLISHED LEGAL PRINCIPLES IN THIS COURT

The sole complaint of petitioners is that the presence of static electricity made the vessel unseaworthy as a matter of law, "—since it was not originally intended to have its hold charged with electricity." (See Objection to Jury Charge, Petitioners' Appendix, Page 9a). This they say entitled them to a directed verdict below.

Petitioners object that the denial of such a directed verdict in their favor conflicts with *Mitchell* v. *Trawler RACER, Inc.* (1960) 362 U. S. 539 and with *Alaska SS Co., Inc.*, v. *Petterson* (1954) 347 U. S. 396. Their position is not sound. In both of those cases it was established that a part of the vessel itself was defective and caused injury to a workman on board. The *Mitchell* case established that a defect could impose liability even though only temporary in nature. The *Petterson* case stands for the rule that defective equipment may make a vessel owner liable even when the equipment was not furnished by such owner.

In the present case these principles were not rejected or ignored. As already stated the rule was followed below that the presence of electricity emanating from bad wiring in the vessel or from a source unexplained would cast liability upon respondent. This was stated without any reference to whether respondent was or was not negligent in bringing such condition about. Liability in such case was held to be absolute, regardless of fault. It then became a factual question whether the cause was bad wiring, an unexplained source, or static electricity not constituting a defective condition of the vessel. No directed verdict was proper for either side. Correct legal principles thus being applied to a disputed factual situation, the verdict against petitioners should not be disturbed.

But petitioners insist also that the present decision is at odds with that of the Circuit Court of Appeals for the Second Circuit as expressed in *Van Carpals* v. *The SS AMERICAN HARVESTER* (1961) 297 F(2d) 9. Again their position is unsound. In *Van Carpals,* steam and hot water came out of a valve and caused injury. No explanation was given by the vessel owner to show why this occurred. In this situation the Court of Appeals held the vessel unseaworthy and directed a verdict, saying that the conceded physical facts required a finding that the valve was defective and unfit for the purpose at hand.

But here a factual explanation was offered by respondent establishing what had caused the shocks thus offering an alternative which eliminated the vacuum existing in the *Van Carpals* proof and reflected the presence of a condition for which respondent was not legally liable. The fact finder here thus had a choice not available

in the *Van Carpals* case. For petitioner here did not simply recite that it did not know what caused the accident (as was the situation in *Van Carpals*), but affirmatively went forward with acceptable factual proof of what occurred.

Nor do the decisions below conflict with the principles set forth in *Morales* v. *CITY OF GALVESTON* (1962) 370 U. S. 165. There an unexpected and unforeseeable introduction of chemical fumes into a tank of a vessel caused injury to workmen there. This Court found the vessel seaworthy, the accident being an unexpected isolated occurrence. Here the proof established that the shocks were unexpected, not foreseeable or to be guarded against, and without precedent in the experience of the witnesses. This proof established without question that respondent was not negligent and that its vessel was reasonably fit, reasonably suitable for her intended service. *Mitchell* v. *Trawler RACER, Inc.* (1960) 362 U. S. 539.

3.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The legal principles applicable to this case have already been established. What we have here is simply a disputed factual situation to which those established principles were applied. The choice by the fact finder of one set of those facts over the other is no basis for a review by this Court.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 5, 1968.

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